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CASE NO. 86-344

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE STATE OF OHIO
MARK HOLDERMAN, and KENNETH COX,
Appellants,

v.

FLEET AEROSPACE CORPORATION,
Appellee.

ON APPEAL FROM
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JURISDICTIONAL STATEMENT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC. AS AMICUS CURIAE

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18 pp

Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae

The North American Securities Administrators Association, Inc. (NASAA) is a nonprofit voluntary membership organization whose membership includes the securities law administrators of the fifty (50) states, the District of Columbia, and Puerto Rico, as well as the twelve (12) provincial and territorial securities administrators in Canada. NASAA hereby respectfully moves for leave to file the attached brief, as *amicus curiae*, in support of the jurisdictional statement in the present case. The consent of the attorney for the Appellants has been obtained. The consent of the attorney for the Appellee was requested and refused.

The interest of NASAA in this case arises from the fact that thirty of its United States member states currently have enacted either a take-over or control share acquisition statute or both. Many of these statutes are second or third generation statutes enacted since 1982 when this Court struck down the Illinois Take-over Act in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982).

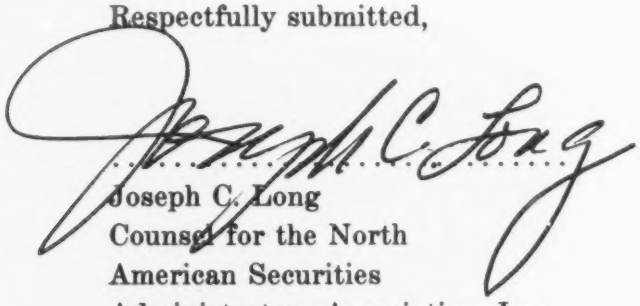
In *MITE*, several members of this Court indicated that they believed that the States had a continuing role in the overall scheme of take-over regulation in this country. These second and third generation statutes are a good faith effort by the states to find and occupy that role under the limited guidelines provided by the Court in *MITE*. However, since 1982 these statutes have been subjected to continuous challenges on the same Supremacy and Commerce Clause grounds enunciated by the lower courts in the present case. In nine out of ten of these cases, the statute has been held unconstitutional. Yet in most of these cases, as in the lower court opinions in the present case, there has been a singular lack of effort on the part of the lower courts to analyze the statutes before them or to provide

guidance as to how the perceived Constitutional infirmities might be corrected in future legislation. The lower court decisions have, in large measure, been nothing more than a mechanical, rote application of a perceived message from *MITE* that the area has been effectively preempted by federal regulation.

The Court has already indicated that it will hear argument involving a similar, but not identical, control share acquisition statute in *Indiana v. Dynamics Corp., jurisdiction noted*, 56 U.S.L.W. (U.S. Oct. 6, 1986). If the Court takes jurisdiction in the present case, between the two cases it will have before it two of the major regulatory patterns which have developed in the second and third generation statutes. As a result, the Court will be in a position to provide much needed guidance as to the continued viability of state regulation in this area. If the experience with the lower federal court decisions since *MITE* is an accurate guide, the Court's decision in *Dynamics Corp.* and this case will have an impact not only upon the Indiana and Ohio statutes immediately under review, but will also have wide-ranging effects upon all the other second and third generation state acts whether or not they have similar provisions.

The focus of the lower court opinions in the present case, and to a more limited degree the Appellants' Brief in connection with the Jurisdictional Statement, have been narrow, isolating the Supremacy and Commerce Clause defects found in the Ohio Act. The brief which *amicus curiae* is requesting permission to file will contain a discussion of the issues on a wider scope to provide the Court with a broader perspective as to why the states feel that the Court should take jurisdiction in the present case.

Respectfully submitted,



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BRIEF ON JURISDICTIONAL STATEMENT FOR NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC. AS *AMICUS CURIAE*

Interest of the *Amicus Curiae*

The North American Securities Administrators Association, Inc. (NASAA) is a non-profit voluntary membership organization. Membership in NASAA is open to all state and provincial securities regulators and agencies in the United States, Canada, and Mexico. Presently its membership includes the state officials charged with the enforcement of the blue sky laws of all the States, the District of Columbia, and Puerto Rico as well as the twelve (12) Canadian provinces and territories. The purpose of the organization is to deal with issues of common interest, to further the enforcement of the state blue sky laws, and to coordinate such state statutes with the federal securities laws by cooperating with the Securities and Exchange Commission (SEC) in areas of mutual interest.

Prior to this Court's decision in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), thirty-six (36) states had adopted takeover statutes. After the *MITE* decision many of these statutes were

held unconstitutional. However, state interest in the takeover and control share acquisition area has remained extremely high. As a result, presently thirty-one states (31) have some form of takeover or control share acquisition statutes.[1] Many states have both.[2] Many of these statutes are second or third generation statutes in which the States have made good faith efforts to comply with the limited Constitutional guidelines supplied by this Court in *MITE*. These second and third generation statutes have been continuously subjected to attack

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[1] Alaska (A.S. § 45.57.010); Arkansas (Ark. Stat. Ann. § 167-1264 (1977)); Delaware (Del. Code Ann. Title 8,8203); Georgia (Fair Pricing Code §§ 14-2-231 to 14-2-250); Hawaii (Hawaii Rev. Stat. tit. 23, §§ 417 E-1 to 417 E-15, 416-171 to 416-172); Idaho (Idaho Code §§ 30-1501 to 30-1514); Illinois (Ill. Rev. Stat. ch. 121½ § 137.1-.16); Indiana (I.C. 23-2-311 (1979); Iowa (Iowa Code § 502 (1978)); Kansas (Kansas Stat. ch.17, art. 12, §§ 17-1276 to 17-1285); Kentucky (K.R.S. 292.560-292.630); Louisiana (La. Rev. Stat. §§ 12-132 to 12-134); Maine (13 MASA ch. 23); Maryland (Md. Corporations and Associations Code §§ 3-601 to 3-603, 8-301); Massachusetts (M.G.L. ch. 110C); Michigan (M.C.L.A. §§ 451.901-917; M.C.L.A. §§ 450.1775-.1784); Minnesota (Minn. Stat. §§ 80B.01-.13,302A.011 (37-41), 302A.499(7), 302A.671); Mississippi (Miss. Code Ann., §§ 75-72-101 et seq. (1980); Miss. Code Ann. §§ 79-25-1 et seq. (1985)); Missouri (Mo. Laws §§ 409.500-.506 (1986)); Nebraska (Neb. Rev. Stat. §§ 21-2418 to 21-2430); New Hampshire (N.H. Rev. Stat. Ann. § 421A); New York (§§ 1600-1613 Bus. Corp. Law); Ohio (O.R.C. §§ 1707.041-.042; O.R.C. §§ 1707.831-.832); Oklahoma (Okla. Stat. Title 71 §§ 451-462); Pennsylvania (70 P.S. § 71 et seq.); South Carolina (S.C. Stat. §§ 35-2-10 to 35-2-130); South Dakota (S.D.Stat., § 47-32.1-.45 (1983); S.D. Stat. § 47-4-22 (1965)); Tennessee (T.C.A. 48-5-101); Utah (Utah Code Ann. §§ 61-5-1 to 61-5-14); Virginia (Va. Code § 13.1-528 (1985); Va. Code 13.1-725 (1985)); Wisconsin (Wisc. Stat. ch. 552 (1986); Wisc. Stat. § 180.725; 180.25(9)).

[2] Indiana, Kentucky, Maine, Michigan, Mississippi, New York, Ohio, Pennsylvania, South Dakota, Virginia, Wisconsin.

on the same Supremacy and Commerce Clause grounds that were raised in *MITE* and were the basis of the lower court opinions in the present case. With the notable exception of *Cardiff Acquisitions Inc. v. Hatch*, 751 F.2d 906 (8th Cir. 1984), virtually all these lower court decisions have invalidated these second and third generation statutes. However in doing so, the lower courts, as the lower court in the present case, have consistently failed to analyze the changes made in the statutes as a result of *MITE* or provide any guidelines as to how the States could overcome the perceived Constitutional objections. As a result the lower court decisions, especially the Sixth Circuit opinion in the present case, amount to nothing more than a mechanical, rote application of an incorrectly perceived message from this Court in *MITE* that the states have no legitimate interest in the regulation of the takeover of, or in the change of management control of, a corporation and that this area is now exclusively governed by federal law.

This Court has already indicated that it will hear argument in a case involving the Indiana Control Share Acquisition statute. *Indiana v. Dynamics Corp.*, jurisdiction noted, 56 U.S.L.W. (U.S. Oct. 6, 1986). However, the Indiana statute and the Ohio statute in the present case have material differences. By taking the present case, the Court will have the opportunity to consider two of the major regulatory patterns which have emerged in the new generation statutes. As a result, the Court will be in a position to provide much needed guidance, which the lower courts have consistently failed to provide, as to the continued viability and scope of state regulation in this area.

If the experience with the lower court decisions since *MITE* is a fair indication of how the lower courts will react to this Court's decision in *Dynamics Corp.* and the present case, these cases will have not only a direct impact upon the Indiana and

Ohio control share acquisition statutes under review, but also a wide-ranging impact upon all other second and third generation takeover and control share acquisition statutes whether or not they follow the statutory pattern found in the statutes under review.

Many, but not all, of these new generation statutes are administered by the state securities agencies or other administrative units within the same governmental office as the securities agencies which are NASAA members. Further, in the present case, one of the Appellants, Mark Holderman, Acting Commissioner, Ohio Division of Securities, is a NASAA member. Therefore, NASAA and its individual state members have great interest in the outcome of this case as it will directly impact upon the statutes which these NASAA members either administer or in which they have more than a passing interest.

GROUNDS FOR PLENARY CONSIDERATION

The issues involved in the present case are substantial and need full and decisive resolution by this Court.

THIS COURT NEEDS TO PROVIDE GUIDANCE TO THE STATES AND LOWER FEDERAL COURTS AS TO THE APPROPRIATE SCOPE OF STATE REGULATION IN THE TAKEOVER AND CONTROL SHARE ACQUISITIONS AREA.

Since the emergence of the takeover phenomenon as a substitute for the more traditional merger or consolidation as a means of gaining control of corporations and their assets in the mid-1970's, the states have shown a substantial and continuing interest in sharing regulatory authority with the federal government over takeovers or control share acquisition. At the time this Court last considered the issue in *Edgar v. MITE*

Corp., 457 U.S. 624 (1982), some thirty-six (36) states had some form of takeover statute. Even though the Court declared the Illinois Takeover Act unconstitutional in ***MITE***, the decision appeared to leave some room for continued state participation in this area. Armed with the limited guidance provided in ***MITE***, a number of states sought, in good faith, to identify and exercise the permissible limit of regulation allowed them through the passage of second and, in some cases, even third generation statutes regulating takeovers and control share acquisitions. Presently, a survey of the NASAA membership reveals that there are thirty-one (31) states which have some form of regulation in this area. About two-thirds of these statutes are either entirely new since the ***MITE*** decision or represent a substantial modification based upon the state's understanding of the teaching of ***MITE***.

These second and third generation statutes have been continuously subjected to the same challenges on the same Supremacy and Commerce Clause grounds that were raised in ***MITE***. In every case that NASAA is aware of with the notable exception of *Cardiff Acquisitions, Inc. v. Hatch*, 751 F.2d 906 (8th Cir. 1984), the state statutes have been found to be unconstitutional, regardless of the form the regulation takes or the substance of that regulation. The lower court opinions in this area show a sameness both dreary and mechanical. More importantly they reflect an unwillingness on the part of the lower federal courts to deal in any meaningful way with the major Constitutional issues which have not been definitively resolved.

A prime example of this is the treatment of the Supremacy Clause issue by the Seventh Circuit in *Dynamics Corp. of America v. CTS Corp.*, 794 F.2d 250 (7th Cir.), *jurisdiction noted* 56 U.S.L.W. (U.S. Oct. 6, 1986). This issue and the preemptive effect of the Williams Act was specifically not

resolved by a majority of this Court in the *MITE* decision. In fact, an even cursory review of *MITE* would reveal a substantial division of opinion within the Court on this issue. Yet the Seventh Circuit engaged in a very limited review of the issue, acknowledged that there could be reasonable doubts on the appropriate conclusion to be drawn, but then concluded the matter should be resolved *not* by analysis, but by the weight of precedent, saying: "But whatever doubts of the Williams' Act preemptive intent we might entertain as an original matter are stilled by the weight of precedent." 794 F.2d at 262. The Sixth Circuit opinion in the present case shows a similar unwillingness to consider in any meaningful way the Constitutional issues. It disposes of both the Supremacy and Commerce Clause arguments in two short paragraphs. *Fleet Aerospace Corp. v. Holderman*, 796 F.2d 135, 139 (7th Cir. 1986), reprinted Appellants' Jurisdictional Statement at A-6.

Beyond this, the lower court opinions show a decided unwillingness to analyze the provisions of the individual statutes before them and to provide the States with any meaningful guidance as to how the perceived Constitutional infirmities might be remedied in future legislation. Again, the Sixth Circuit opinion in the present case provides a ready example. The court, without any analysis of the individual provisions of the Ohio Control Share Acquisition Act, merely affirmed the trial court on the Supremacy issue by citing the often reached general conclusion that the state act was preempted because it created impermissible delay and impermissibly tipped the scales in favor of incumbent management by requiring a shareholder vote.

In defense of the lower federal courts, it must be said that this treatment may in part be due to the speed with which these cases must be heard and decided. But it is also in large measure due to the failure of this Court to provide them with

meaningful guidance as to the correct resolution of the Constitutional issues.

This Court has addressed the takeover area on two previous occasions in *Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979) and the *MITE* case, *supra*. Neither provided any substantial resolution of the Constitutional problems involved. In *Leroy*, the Court disposed of the case on procedural grounds. In *MITE*, the Court was badly fractionalized and no clear majority position emerged. Three Justices did not address the merits, but voted to dismiss the case as moot. Three Justices, including Chief Justice Burger, concluded that the Illinois Act was preempted by the Williams Act and therefore violated the Supremacy Clause. Nor could a majority agree on whether the Illinois statute represented a direct burden on interstate commerce. The only majority position to emerge was found in Part V B of the opinion and said that the Illinois Act imposed an impermissible *indirect* burden on interstate commerce because the local benefits did not outweigh the burden the Act imposed. However, two of the remaining three Justices making up the majority, specifically conditioned their concurrence on the fact that there was no preemption and that the states still had a meaningful place in the regulation of takeovers and control share acquisitions.

Plenary consideration of the present case will give the Court the opportunity to review in depth the Constitutional issues involved and to provide the States and the lower courts with definitive guidance as to how similar disputes should be resolved in the future. While NASAA strongly supports the Appellants' position that the states do have a role to play in the regulation of this area and that the Ohio Act is therefore not in violation of either the Supremacy or Commerce Clauses, it urges the Court to provide a clear answer one way or another.

NASAA realizes that the Court has already agreed to hear an appeal in a companion case involving the Indiana Control Share Acquisition Act. *Indiana v. Dynamics Corp.*, 56 U.S. L.W. (U.S. Oct. 6, 1986) (No. 86-97). However, as noted in the Appellants' Jurisdictional Statement there are substantial differences between the Ohio Act involved in the present case and the Indiana statute involved in *Dynamics Corp.* See Appellants' Jurisdictional Statement, p. 3 note 2. By taking both cases, the Court will have the opportunity to review at one time two major regulatory patterns which have developed since the *MITE* decision. Thus the inclusion of the present case will increase the depth of the review given the area and the definitiveness of the decision which will result.

NASAA submits that this plenary review should consider and resolve the following three major Constitutional issues.

First, the Court should decide whether the Williams Act preempts completely state regulation of takeovers and control share acquisitions. The Court in *MITE* made clear that the Williams Act does not expressly preempt state regulation in this area. However, a fair reading of the lower court decisions since *MITE* suggests two conclusions. First, the lower courts have concluded that there is a practical preemption of state regulation in that any requirement that extends the date on which the offeror may close out the takeover beyond the twenty (20) day period provided by SEC Rule 14e-1(a), 17 C.F.R. §240.14e-1(a) (1986), constitutes an impermissible conflict. Second, they also have concluded that the imposition of any further requirements such as winning shareholder approval for such tender or acquisition of control improperly tips the balance in favor of incumbent management. NASAA joins with the Appellants in urging the Court to reject this trend of decisions and hold that there is no preemption in general and,

more specifically, that the Ohio Act provisions do not conflict with the Williams Act.

Certainly there is no basis for this approach in the Court's decision in *MITE*. As noted above, three justices, one of whom is no longer sitting, forming a purality of the Court considering the merits in *MITE*, did find preemption. However, Justices Stevens and Powell, concurring to form the majority of the Court, specifically rejected the concept of preemption, indicating they believed that the state continued to have a role in the regulation of takeovers and share acquisitions. Justice Powell in his concurring opinion stated:

> I agree with Justice Stevens that the Williams' Act neutrality policy does not necessarily imply a congressional intent to prohibit state legislation designed to assure — at least in some circumstances — greater protection to interests that include but often are broader than those of incumbent management.

MITE, 457 U.S. at 646-47 (Powell, J., concurring). Justice O'Conner likewise did not reach the preemption issue.

This split led the Eighth Circuit in *Cardiff Acquisitions Inc. v. Hatch*, *supra*, to state concerning the preemption issue:

> Because the remaining four justices did not reach the issue, the Court has not definitively resolved whether the view of Justices Powell and Stevens, the view of Justices White, Burger, and Blackmun, or some other analysis should apply.

751 F.2d at 913. The Eighth Circuit went on to hold that the Minnesota Takeover Act under consideration was not, except in minor respects, preempted by the Williams Act.

In light of the fact that a majority of the Court has not expressed their opinion on the Supremacy Clause issue,

NASAA submits that the present case presents an appropriate vehicle for the Court to examine that issue and provide a definitive answer. NASAA joins with the Appellants in urging the Court to adopt the position of Justices Powell and Stevens that there is an appropriate place for state regulation in the area of takeovers and control share acquisitions.

One specific comment concerning the particular features of the Ohio Act that the trial court found repugnant is in order. It should be noted that the twenty (20) day minimum offer period mandated by SEC Rule 14e-1(a) is an *anti-fraud* provision. The SEC is saying that it is a fraudulent practice if the tender offer is not open for at least twenty days. It is inconceivable that the trial court could conclude that requiring the offer to be open for a longer period would be inconsisent with this policy of the Williams Act. A requirement that the offer be open for even longer periods will give the shareholders a longer period to consider and digest the information they have been provided. It is only when a state requirement might extend the period for closing the takeover beyond the sixty (60) day period where shareholders will be allowed to withdraw that any interference with the policy of the Williams Act comes into play.

Second, NASAA submits that the Court should decide whether the inclusion within the state's corporate code of provisions dealing with takeovers and control share acquisitions which apply to corporations formed under the laws of that state are impermissible direct burdens on interstate commerce or permissible internal affairs provisions generally recognized as legitimate concerns of the state of incorporation regardless of where the shareholders are located. The trial court in the present case and in *APL Limited Partnership v. Van Dusen Air, Inc.*, 622 F. Supp. 1216 (D.Minn.), *vacated* Case No. 85-5285/5286 (8th Cir. Nov. 26, 1985) viewed the

voting requirements of Ohio and Minnesota Control Share Acquisition statutes as impermissible direct burdens on the basis that they constituted an improper attempt by the state of incorporation to control the rights of the shareholders who were not residents of the state of incorporation rather than the corporation itself. This issue was briefly considered in Part V B of the *MITE* opinion which constituted a part of the majority opinion. Justice White summarily disposed of the issue by claiming that the "internal affairs" doctrine was merely a rule of conflicts of law. NASAA would submit that while it may be a rule to aid in the resolution of conflicts of law, the internal affairs doctrine occupies a very basic place in the American concept of a corporation. A corporation is an artificial legal entity created by a state as a sovereign, and the rights and privileges that corporation enjoys are dependent upon the grant from the sovereign. Further, a corporate charter is generally viewed as a tripartite contract between the granting sovereign, the corporation, and its shareholders. Thus the rights of all the shareholders, whether residents of the incorporating state or not, are affected by this contract and by the laws of the state of incorporation.

NASAA joins with the Appellants in urging the Court to reexamine this issue in depth in light of the importance of this concept to state corporate law. It urges the Court to conclude that such provisions are permissible regulation of the internal affairs of the corporation it creates and that the state does have the right to regulate these internal affairs even though there will be a direct impact upon the shareholders who do not reside in the state. The state's interest here is not in the protection of its local shareholders, but rather in the regulation and control of the corporations it creates.

It is naive to conclude that the transfer of control only affects the shareholders and not the corporation. This ignores

the substance of the transaction and looks only to its form. Just as the sale of all or substantially all the assets of a corporation are considered today to be the functional equivalent of a merger or consolidation, the takeover or sale of a controlling interest in a corporation should be viewed as the functional equivalent of a merger or consolidation.

Finally, NASAA submits that the Court should consider whether the particular provisions of the challenged Ohio Act do in fact impose an impermissible indirect burden on interstate commerce. While the trial court so found in the present case, NASAA joins with the Appellants in urging the Court to review this conclusion and find it to be error.

CONCLUSION

Granting plenary review of the present case will provide the Court with an appropriate vehicle to review the entire area of the appropriate scope of state regulation of takeovers and control share acquisitions. Guidance to both the States and lower federal courts is desperately needed as this Court on two previous occasions has not squarely addressed the issues involved and provided a definitive resolution of them. NASAA urges the Court to take this opportunity and resolve these major Constitutional issues which are of extreme importance to the States.

Dated: Norman, Oklahoma
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